IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 468

JOHN BARCOTT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

CASES CITED

STATUTES AND CONSTITUTIONAL PROVISIONS CITED

TEXT

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, John Barcott, respectfully applies for the allowance of a Writ of Certiorari to review a decision of the Court of Appeals for the Ninth Circuit entered on the 17th day of September, 1948 (R. 485), affirming a judgment of the District Court for the Western District of Washington, Southern Division entered on the 24th day of November, 1947 (R. 472-476).

The Indictment (R. 2) charged the petitioner in three counts with separate violations of Section 145

(b), U. S. Code, Title 26. Petitioner was found guilty on all three counts by verdict of the jury.

Opinion of the Court Below

The judgment of the District Court was affirmed by the Circuit Court of Appeals, whose opinion commences on page 486 of the Transcript of Record.

Jurisdiction

Jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), 28 U.S.C., Section 347 (a). The judgment of the Court of Appeals was entered on September 17, 1948. An order denying Petition for Rehearing was entered on November 1, 1948. The time for filing this petition was extended to and including December 20, 1948, by order of this court dated November 24, 1948.

Questions Presented

1. Is proof of the acquisition of assets in excess of reported income for a given year sufficient to establish the necessary corpus for the crime of income tax evasion?

2. Where there is no evidence as to a taxpayer's net worth prior to the commencement of a taxable period, is evidence of purchase of assets in excess of income for said taxable period sufficient to establish an increase in the net worth of said taxpayer?

3. Where a taxpayer is furnished with a Bill of Par-

ticulars setting forth the sources from which alleged unreported income was received by him, and the evidence fails to show any unreported income derived from the particularized sources, is there such a variance and failure of proof as to warrant a judgment of acquittal?

4. In the trial of a criminal cause of action where the prosecution relies on circumstantial evidence, should the case be submitted to the deliberation of the jury where the circumstances offered in evidence are not inconsistent with every hypotheses except that of guilt?

Statute and Constitutional Provisions Involved

Petitioner was prosecuted under 26 U.S.C. 145 (b), enacted as part of the Internal Revenue Code on February 10, 1939, c. 2, Section 145, 53 Stat., which is as follows:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

The following portion of the Sixth Amendment to the Constitution of the United States is applicable in this case:

"In all criminal prosecution the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *"

Reasons Relied on for Issuance of Writ

1. The interpretation and construction of the criminal sections of the Internal Revenue Code are of vital concern to every American taxpayer. If the decision of the Court of Appeals in this case is a fair expression of the law of the land it should be so announced by the Supreme Court so that every taxpayer will be clearly forewarned that acquisition of any assets in a given year over and above his reported income will constitute prima facie evidence of income tax evasion and will be sufficient to place the burden upon him to prove his own innocence in the transaction.

2. The decision of the Court of Appeals is in conflict with the decisions of other Circuits as it authorized submission of the case to the jury on circumstantial evidence when the circumstances relied on are not inconsistent with every other theory except guilt.

3. The decision of the Court of Appeals is in conflict with decisions of other Circuits, as well as its own prior decisions, when it fails to limit the Government to proving facts in support of the charge made in the Indictment as particularized in the Bill of Particulars.

Statement of the Case

Petitioner owns the California Oyster House located in Tacoma, Washington, which he has operated since

the year 1919. He was indicted for the crime of income tax evasion, the indictment being in three counts (R.2), the substance of the Government charges being as follows, figures being on a community property basis:

Calendar Year	*Income Reported*	*Actual Income*	*Tax Reported*	*Actual Tax Due*
1943	$6,720.40	$12,406.33	$1,545.38	$3,646.25
1944	5,632.57	9,926.61	1,288.45	2,727.85
1945	7,388.98	11,138.92	1,833.36	3,201.96

The Indictment sets out the sources of unreported income as follows:

1. Dividends and interest.

2. Income from business (R. 2).

Upon motion of the defendant (petitioner herein) a Bill of Particulars was ordered which set out that the unreported income from business is the California Oyster House (R. 17). During the trial it was stipulated that all income from dividends and interest was accurately reported (R. 402). Therefore, the only source from which defendant allegedly received income and failed to report was the Oyster House.

It is to be specifically noted that the defendant filed income tax returns for the years in question and that a report of income from operation of the Oyster House was made in each instance. (Pltfs. Exs. 1, 2, 3.)

It is also to be noted that the defendant maintained books of account for the Oyster House showing his

daily receipts, expenditures and costs of labor. (Defs. Exs. A1, A2; R. 206-211.)

In attempting to prove the case, the prosecution showed the following:

1. That the defendant was investigated when it was learned he acquired ten $1000 bills for smaller currency (R. 71-72).

2. That he allowed an agent to inventory the contents of his safe deposit box which showed purchase of war bonds in the sum of $59,750 for the three years in question, as well as $23,000 in cash (R. 126, 128, 129).

3. That after the foregoing box was examined, defendant, on the same day, entered another safe deposit box owned by him (R. 104; Ex. 11).

4. That prior to the years in question defendant had purchased some items of furniture on an instalment contract.

5. That in 1940 he surrendered four shares of stock in a corporation to pay off a $200 note owing to the corporation since 1932.

(a) That the stock paid a dividend of 6% twenty days later (R. 334, 335).

6. That in 1946, Agent Swanson made an inventory of defendant's known assets from which he concluded that defendant had a net worth in January 1943 of $57,278.56, which increased as follows:

December 1943	$ 79,206.60
December 1944	97,462.75
December 1945	116,316.60

for a total increase of $59,039.04. Swanson admitted he did not know how much cash the defendant may have had in 1942, but assumed it was the same as what was inventoried in 1946 (R. 136). He did not know where the money came from for the purchase of bonds during the three years in question. He *assumed* defendant got the money from the business, stating he had no other knowledge (R. 136). He knew defendant was in business since 1919, but in arriving at a net worth figure he did not consider what the defendant might have been worth when he commenced business; and how much defendant's wife may have brought into the community when she married the defendant. He assumed defendant had nothing at that time (R. 148-149). In determining net worth as of January 1, 1943, the agent arrived at his figure by adding defendant's prior bond purchases to the value of the real estate and restaurant owned by the defendant, and then assumed that defendant's cash assets were identical to those examined and revealed in 1946. Nothing else was considered (R. 137). The witness explained with frankness that in arriving at a net worth figure, "the amount you start with is of little or no consequence for the purpose of determining the increase of that year." The verbatim testimony in this regard is as follows (R. 148-149):

"Q. All of these taxes that you have given the Court and jury the benefit of knowing that were

not paid, were on the assumption that Mr. Barcott had nothing else on January 1, 1943, except what you say was in the box, at that time.

"A. A tax is computed on the increase of certain items.

"Q. Increase during those years?

"A. During those years, not — it wouldn't matter a bit if the amount was less. It's only on the increase that a man makes from the beginning of the year and the end of the year. So the amount that you start with is of little or no consequence for the purpose of determining the increase of that year."

7. That the defendant attempted to bribe the Agent Nielsen in return for a favorable report (R. 75).

Specifications of Error

I.

The Court of Appeals for the Ninth Circuit erred in holding that the District Court did not err in refusing to direct a judgment of acquittal and in submitting the case to the jury.

ARGUMENT

I

Sufficiency of the Evidence

(A) Acquisition of Assets in Excess of Reported Income

The following quotation appears in 1 Wharton's Criminal Law (12th Ed.) Sec. 349, page 543:

> "Before a conviction can rightfully be had on a criminal charge, the prosecution must show (1) the *corpus delicti*, (2) that it was produced by a criminal act or agency, (3) that the accused did the criminal act, or set in motion the criminal agency, or sustains responsible complicity therewith. Mere proof of conduct exhibiting satisfactory indications of guilt is not sufficient to warrant a conviction, unless there be satisfactory evidence that the particular crime has been committed."

A search of the authorities has failed to reveal any reported case which has extended the rules of criminal proof to the point where a mere increase in assets over reported income established the necessary corpus for criminal prosecution in income tax cases. Frankly, no such authority was expected to be found, as it would place the burden of proving innocence on the defendant.

Analysis of the Government's case fails to reveal evidence of a single dollar of tax due to the United States. The purchase of war bonds in excess of reported income obviously contains no evidence of criminality, and it certainly furnishes no evidence of a tax due.

In *Paschen v. United States*, 70 F. (2d) 491 (C.C.A. 7, 1934), the figures from a very large bank account which defendant maintained under an assumed name were introduced in evidence as proof of income during the current year which he failed to report. The court concluded that this bank account of itself, without some evidence that it was earned in the taxable year, could not be used to show income tax evasion. The specific language used by the court in this regard is as follows:

> "The Anderson account was as much Paschen's own account as if it had been carried in his own name. About this there is no controversy. But as to the unidentified balance appearing to have been deposited in the Anderson account during that year, we believe it involves too much of speculation to admit of indulgence in the presumption that, because a few of the items making up the large Anderson account were shown to have been of commercial accounts not included in the tax return, it therefore follows that the large unidentified balance of deposits in the accounts represents also commercial accruals during the year, not included in the tax return. This contention of the Government cannot be allowed."

We agree with the Seventh Circuit Court of Appeals that mere proof of assets in excess of reported income is insufficient to establish criminal liability.

The Circuit Court of Appeals was misled in the same manner as was the trial court. This error consisted of seizing upon a group of suspicious circumstances and probabilities which may well have exhibited indications of guilt, and used these suspicious circumstances and probabilities as the basis for criminal conviction, without searching first for evidence of an actual tax due to the Government.

The Court of Appeal's error is indicated in the following quotation from its opinion:

> "The purchases made by appellant were entirely consistent with his statement to the revenue agent that 'I ordinarily accumulate $5,000 or $6,000 and purchase U. S. Savings bonds.' It is difficult to give credence to a theory that appellant made the

> bond purchases in 1943, 1944 and 1945 with funds accumulated prior to 1943. If that were true why did he not purchase bonds when the funds became available, and it is not consistent with the actions of this man of frugal habits to believe he held certain sums accumulated in 1942 in reserve and apportioned specific portions thereof for the purchase of bonds over a period of three years at regular intervals. It is more in keeping with his frugal nature to conclude that he made his investment as the opportunity offered."

It is to be remembered that the defendant reported income of $19,741.95 for the three years in question on a community property basis, which amounts to $39,483.90 as total reported earnings for himself and his wife. With nearly forty thousand dollars of reported earnings, it stands to reason and is admitted that current earnings were being invested by the defendant in U. S. Savings bonds. This does not and cannot mean that bonds were purchased exclusively with current income. The Court of Appeals says it is difficult to give credence to a theory that appellant made bond purchases with funds accumulated prior to 1943. By this language the defendant is placed in the position of proving his innocence. The court speculates and in effect states that it is more probable in the case of this man, because he is of frugal habits, that his purchases were made with current income. But this is a criminal case in which the courts have no right to indulge in probabilities. Each and every element of the crime must be proven by satisfactory evidence, and where the corpus delicti itself is not proved all the suspicious circumstances in the world cannot make a case.

(B) Net Worth.

A search of the authorities has also failed to reveal that a taxpayer can be found guilty of income tax evasion simply because there was an increase in his net worth. There are some reported cases in which the element of increased net worth was offered in evidence as a circumstance in corroboration of other proof of corpus delicti. In all of these cases there was a firm foundation from which increase in net worth could be subsequently calculated, an element totally lacking in the conclusions of the witness Swanson.

Reference is made to the case of *Gleckman v. United States*, 80 F. (2d) 394, (C.C.A. 8), which appears to be typical of cases where the element of net worth is introduced.

In the *Gleckman* case, as well as in all other cases reviewed, where evidence of net worth was introduced, three general principles were always present. They are as follows:

1. In each case the defendant was engaged in a criminal enterprise.

2. In each case there was evidence of money received during the fiscal year from an *unreported* source.

3. In each case the increase in net worth was calculated from a known or admitted basic figure, and the evidence thereof was used only as a corroborating circumstance and not as proof of corpus delicti.

In the *Gleckman* case financial statements previously made and executed by the defendant were used as the foundation and basis to determine increase in net worth. The evidence showed an illegal, unreported source of income with very large bank deposits identified with the business carried on by the defendant.

In this case it is sought to prove guilt solely on the net worth theory. In the first place it is earnestly submitted that no increase in the defendant's net worth was proven since there was no foundation from which subsequent increases could be calculated. Defendant's net worth as of January 1, 1943 was a speculative estimate based on facts assumed but not known by the witness Swanson when he made an inventory of the defendant's visible assets in the year 1946. Secondly, the case was tried and presented to the jury strictly on the theory that increase in net worth is all that was required to prove the corpus of the case. The Government admitted that their entire case was based on the testimony of the witness Swanson:

> "Now as far as our case is concerned it is all contained in one witness, and that is Mr. Swanson here." (R. 415.)

Mr. Swanson himself testified as follows:

> "This income was determined on the increase in net worth basis." (R. 116.)

The court instructed the jury that increases in net worth established one of the essential elements in the case, (R. 451).

Assuming that the defendant's net worth as of January 1, 1943 rested on a known or admitted foundation, which it does not, it must be readily apparent that both the prosecution and the trial court proceeded on the theory that increase in net worth alone would establish the corpus necessary for criminal prosecution. All elements of required proof such as proving that there was a tax due to the Government were utterly disregarded, and the jury were told in effect that if they found the defendant had more assets at the end of the year than he had at the beginning of the year and this amount exceeded his reported income for said year, a necessary element of the crime was proven. As stated before, no reported case supports such a theory and no authority for such a proposition could be established without junking our present system of criminal law.

(C) Failure to Confine Proof as Limited by the Bill of Particulars

> "In all criminal prosecution the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *" *Sixth Amendment to the Constitution of the United States.*
>
> "When a bill of particulars is once made and served, 'it concludes the rights of all parties who are to be affected by it; and he who has furnished a bill of particulars under it must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration.' *Commonwealth v. Giles*, 1 Gray (Mass.) 466, cited and approved in *Dunlop v. United States*, 165 U. S. 486, 491, 17

Sup. Ct. 375, 41 L. Ed. 799. In *United States v. Adams Express Co.* (D.C.) 119 Fed. 240, it is said:

> " 'The office of a bill of particulars is to advise the court, or more particularly the defendant, of what facts, more or less in detail, he will be required to meet, and the court will limit the government in its evidence to those facts set forth in the bill of particulars.' " *United States v. Pierce*, 245 Fed. 888 at page 890.

This rule was followed in all of the following cases:

United States v. Adams Express Co., (Dist. Court, S. D. Iowa, E.D. 1902), 119 Fed. 240.

Kettenbach v. United States, (C.C.A. 9, 1913), 202 Fed. 377.

Braatenlien v. United States, (C.C.A. 8, 1945), 147 F. (2d) 888.

United States v. McKay (Dist. Court E.D. Mich., S.D. 1942), 45 Fed. Supp. 1001.

United States v. Gouled (Dist. Court, S.D. N.Y. 1918), 253 Fed. 239.

United States v. Allied Chemical & Dye Corp., (Dist. Court, S.D. N.Y. 1941), 42 Fed. Supp. 425.

It was disregarded in the case at bar. Defendant was told his tax defalcations were in income from the Oyster House. Although he reported income tax from this source, and kept business records thereon, no evidence of falsity was offered as to either. The case was attempted to be proved on a net worth theory, without

any regard to the particularized source from which it was alleged fraud occurred.

By reason of the authorities cited herein, failure to present evidence of unreported income from the Oyster House necessitated a judgment of acquittal.

(D) Circumstantial Evidence Consistent with Innocence.

> "Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. *Union Pacific Coal Co. v. United States*, 173 F. 737, 740 (C.C.A. 8); *Wiener v. United States*, 282 F. 799, 801 (C.C.A. 3); *Yusem v. United States*, 8 F. (2d) 6 (C.C.A. 3); *Ridenour v. United States* 14 F. (2d) 888 (C.C.A. 3)." (*Nicola v. United States*, 72 F. (2d) 780 at page 786.)

It is submitted as a common sense proposition that each of the following circumstances are as consistent with innocence as with guilt:

1. Changing small currency for that of larger denominations.
2. Purchase of war bonds in excess of current income.
3. Entering one's own safe deposit box.
4. Purchase of furniture on instalment contract.
5. Surrender of stock in satisfaction of indebtedness to corporation for purchase of same.

All of these factors were admitted as evidence of guilt and the Circuit Court in its opinion was compelled to rely thereon in an effort to substantiate the judgment of the trial court.

CONCLUSION

From the foregoing, it is concluded that the Government failed to establish that there was any tax due whatsoever or that there was a failure to report all income from the Oyster House.

Any other conclusion would place the burden on the taxpayer to prove his innocence in a criminal action, merely because he acquired an asset valued in excess of his current income. It is therefore earnestly and respectfully submitted that the Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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No. 468

IN THE

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OCTOBER TERM, 1948

JOHN BARCOTT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Since submitting the petition and brief in support thereof, the case of *Whittemore v. Commissioner*, 7 T.C.M. 845 (Dec. 16,700(M)) Docket No. 13421, was received.

Although the Whittemore case was a civil proceedings for the collection of taxes and penalties ,the facts therein are strikingly similar to those of our case and the law, particularly pertaining to the net worth theory, is directly in point.

Whittemore was in business since 1909. He operated the Clyde Bar at the time he was investigated.

Part of his purchases were by check and part cash from the register. Books of account showing the daily receipts of cash and expenditures were kept. Income tax returns were made on the business. Whittemore had two safe deposit boxes in which cash assets and bonds in a sum exceeding $78,000 were found. Bank accounts were examined. The reported income was substantially in accordance with the books. Deficiencies were determined on analysis of the bank accounts and on what was determined to be net worth increase. From an examination of Whittemore's assets in 1946, the agents made a net worth calculation as of December 31, 1941, and determined that by reason of increase in net worth Whittemore failed to pay $41,272.18 in taxes for the years in question.

In reversing the decision of the Commissioner, the Tax Court said:

> "Arundell, Judge: The deficiencies determined in this case result from *respondent's total disregard of petitioner's books and records and his use of what he terms the net worth method of determining income.* Fraud penalties have also been found for each of the years before us.
>
> "The evidence clearly establishes that petitioner's returns for the years 1942 to 1945, inclusive, were substantially in accordance with his books. Indeed, respondent frankly concedes this to be true. *Moreover, respondent is unable to point to any source of income in any substantial amount other than that flowing from the operation of the Clyde Bar and associated activities.*" 7 T.C.M. 848. (Italics ours.)

"The main reason we are reluctant to accept respondent's method of determining income is the fact, as we have already stated, that *he can point to no known source of income on the part of petitioner other than that which flowed from the Clyde business*, and we are satisfied that the income from that venture was reported with substantial correctness. But there is another reason of equal importance that throws discredit on respondent's method and that is his failure to determine with any degree of accuracy petitioner's net worth at the starting date of December 31, 1941. *It would be absolutely necessary to know the amount of petitioner's net worth at the beginning of the taxable period before one could determine under a net worth basis a taxpayer's income for succeeding years.*" 7 T.C.M. 848, 849 (Italics ours.)

"Petitioner has been in business since 1909 and his activities included such ventures as construction operations, the carrying on of a drugstore, the operation of hotels, taxicabs, etc. He lived during all of these years very frugally and saved his money."

"The use of a method such as employed by respondent where there are no books and records, or where there is evidence that there has been some tampering with the books and records, or where a taxpayer is engaged in activities other than his regular business, may well be justified. But on the facts here produced, we think the respondent was not warranted in disregarding petitioner's books and records and employing the method he did employ in the determination of the deficiencies covering the years before us." 7 T.C.M. 849.

Petitioner in our case kept books which were disregarded. There was no evidence of tampering there-

with. Income tax returns filed included income from the Oyster House in accordance with the books. There was no source of income which was not reported. Petitioner's net worth as of December 31, 1942 was not known, but was merely assumed, even as it was in the Whittemore case. Moreover, ours is a criminal case where petitioner was charged with failure to report taxes from a specific source.

Since reading the Whittemore case, which involved civil liability only, we are more than ever convinced that judgment of acquittal was imperative and the errors of the Court of Appeals in failing to so decide must be reviewed to prevent the perpetration of a travesty on American jurisprudence.

Respectfully submitted,

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INDEX

CITATIONS

821554 49

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OCTOBER TERM, 1948

No. 468

JOHN BARCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 486–493) is reported in 169 F. 2d 929.

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 1948. (R. 494.) Rehearing was denied on November 1, 1948. (R. 495.) The time for filing a petition for a writ of certiorari was extended to December 20, 1948, by order of the Chief Justice (R. 497); and the peti-

tion was filed on December 17, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254. See also Rules 37 (b) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. In a criminal action for wilful evasion of income tax payments for 1943, 1944, and 1945, whether proof of additional unreported net income for each of the years involved may rest upon demonstrated yearly increases in net worth plus evidence from which the jury could properly infer that the petitioner had insufficient other assets at the beginning of the period with which to account for the increases during the taxable years.

2. Whether the proof transcended the allegations in the bill of particulars.

STATUTE INVOLVED

Section 145 of the Internal Revenue Code, 26 U. S. C. 145, provides in pertinent part:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat

any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

The petitioner was charged in a three count indictment returned in the Western District of Washington with having wilfully attempted to evade and defeat a large part of his individual income taxes for the calendar years 1943, 1944, and 1945, in violation of Section 145 (b) of the Internal Revenue Code. The indictment alleged the following evasion:

Calendar year	Income reported	Actual income	Tax reported	Actual tax due
1943	$6,720.40	$12,406.33	$1,545.38	$3,646.25
1944	5,632.57	9,926.61	1,288.45	2,727.85
1945	7,388.98	11,138.92	1,833.36	3,201.96

These figures reflect a division of net income and tax liability on the community property basis. (R. 2–5, 130–131.)

At the trial, evidence was introduced from which the jury could find the following facts:

From the year 1919, to and including February, 1946, the petitioner conducted a restaurant business in the city of Tacoma, Washington. His income tax returns were not challenged until

certain money transactions in which the petitioner was involved were reported to the Treasury Department; and an investigation was then ordered. The particular money transaction which aroused the curiosity of the Treasury Department was an exchange, by the petitioner, of currency of ordinary denomination for ten $1,000 bills. The bank with whom this exchange was had made the report to the Treasury Department. (R. 486.)

One Nielsen, a revenue agent, was assigned to make the investigation. He contacted the petitioner and informed him that he was investigating the currency exchange. The petitioner volunteered to go with Agent Nielsen to a certain bank and exhibit to him the ten $1,000 bills which Agent Nielsen had been told that the petitioner had received in exchange for currency of smaller denominations. The petitioner informed Nielson that the ten $1,000 bills were in a safety deposit box. Upon arrival at the bank, the petitioner produced two packages of currency which he took from his person. The packages each contained ten $1,000 bills, totalling $20,000. The safety deposit box, which was then opened, was found to contain $3,000 in cash and Government bonds of the face value of $75,000. The Agent then began making an inventory of the contents of the safety deposit box. While Nielsen was so engaged, the petitioner made a proffer to him of one of the bundles of money, found in the box, containing $500. The

petitioner stated to Nielsen: "You make a favorable report on this matter and just forget about the whole thing." Agent Nielsen declined the offer. The petitioner persisted and made a further offer, stating: "Now Nielsen, we are alone, only two of us, can't you take a package of this and make a favorable report on it?" Again being rebuffed by the agent, the petitioner endeavored to raise the amount of the proffered bribe, stating: "I feel sick inside. Let me buy you a suit of clothes and your wife a fur coat, and you take this money and make a favorable report on me." Again, the Agent rejected the offer. (R. 486–487.)

At a later date, Agents Nielsen and Swanson inventoried the contents of the safety deposit box and found the contents to be the same as upon the previous examination by Nielsen. The inventory of the bonds contained in the safety deposit box disclosed that during the year 1943 the petitioner purchased bonds at a cost to him of $20,750. During 1944, the war bond holdings of the petitioner were increased at a cost to him of $19,000, and in 1945, the increase was at a cost to the petitioner of $20,000. (R. 488.)

On the basis of all available records (R. 118), Agent Swanson made a computation of the petitioner's net worth at the beginning of 1943 as $57,278.56; at the end of 1943, this net worth was $79,206.60. The increase in 1944 was to the sum

of $97,462.75 and in 1945, to $116,316.60. The total increase during the three years was $59,039.04 (R. 488), as against a total net reported income of $19,741.95 (R. 2–5). This net worth computation assumed, to petitioner's advantage, that he had retained since 1942 the $23,000 in cash which he had on his person and in his safety deposit box during the investigation in 1946. (R. 120–1.)

There was also testimony that, from 1919 through 1942, the petitioner reported a tax liability in only four years: 1929, $12.07; 1936, $17.25; 1937, $3.81; 1938, $10.29. In 1942, he reported a taxable income of $8,236.30. On the basis of these figures, the maximum taxable income attributable to the petitioner was $89,291.09, from 1919 through 1942. (R. 143.) Allowing for minimum living expenses ($125 a month for his wife and his family), Agent Swanson testified that, based on the income tax returns filed during the period 1919 through 1942, the petitioner had a possible net worth at the beginning of 1943 of $53,000, or $4,278 less than the net worth actually used by Swanson in his computation of tax liability described above. (R. 144.)

The petitioner claimed at the trial that from 1919 to 1940 he had saved in cash "about sixty-sixty-five thousand or something like that." (R. 271.) His accountant, Robert E. Birch, made a computation of the petitioner's net worth for

1942, based upon information given him by the petitioner. The methods used by Birch in arriving at the net worth were much the same as those employed by Agent Swanson, although the results varied substantially as to the amount. (R. 488–489.) Birch testified that "it would have been possible to build up perhaps a cash of sixty-two thousand dollars" at the end of 1942. (R. 383.)

The Government proved that the petitioner owned stock in the Fisherman's Packing Corporation, and that he surrendered some of these shares in 1942 in order to pay off a note in the sum of $200 in favor of the corporation, and which had been due and owing since 1932. This stock was income producing; a dividend of 6% was paid on it within 20 days after the petitioner's surrender of a portion of the shares in payment of the note. It was also shown that during the years from 1937 to 1942, the petitioner had purchased furniture and equipment on installment contracts. (R. 488.)

On the evidence before it, the jury found petitioner guilty of each count of the indictment. (R. 37.) His motion for a judgment of acquittal, or, in the alternative, for a new trial was denied. (R. 38–42.) The Court of Appeals for the Ninth Circuit affirmed, holding that the evidence was sufficient to support the verdict. (R. 486–493.)

ARGUMENT

I

The petitioner asserts, in effect, that the Government failed to prove additional net income in each year in excess of the amounts reported in the respective returns. This claim turns on the hypothesis that the demonstrated net worth increases in 1943, 1944, and 1945 do not require the conclusion that the increases were derived from current income. There are at least two complete answers to the alleged grievance.

Firstly, it is undisputed that the petitioner purchased United States bonds during the taxable years at the following cost: 1943, $20,750; 1944, $19,000; 1945, $20,000. (R. 488.) He reported net income as follows: 1943, $6,720.40; 1944, $5,632.57; 1945, $7,388.98. It is not necessary to consider here whether the overwhelmingly disproportionate relationship between reported income and these expenditures alone warranted a finding that the expenditures were made out of current income (*United States* v. *Johnson,* 319 U. S. 503, 517, rehearing denied, 320 U. S. 808), since the record discloses that the petitioner would "ordinarily accumulate five or six thousand dollars, and purchase United States Savings bonds." (R. 72.) The petitioner's admission in this regard fully warranted the conclusion that the bonds were purchased out of current income. (R. 490–491.) The court below likewise considered it significant

that the bonds were purchased at comparatively regular intervals, a method usually employed by those accumulating funds from time to time throughout the year.

Secondly, despite the petitioner's insistence to the contrary (Pet. 12–14), proof of additional net income in this case did not rest solely on the mere demonstration of net worth increases in each of the taxable years (1943, 1944, and 1945), without proof of the non-existence of prior accumulated funds or of assets in excess of the net worth attributed to the petitioner at the beginning of 1943. The record contains unmistakable evidence of the non-existence of any sufficiently substantial amount of assets prior to the beginning of 1943. Although the petitioner had testified that from 1919 to 1940 he had accumulated some $65,000 in cash (R. 271), the Government adduced evidence that his maximum net worth as of January 1, 1943, computed on the basis of the returns which the petitioner had filed from 1919 to 1942, inclusive, was even less than the amount upon which the computation of liability for prosecution purposes was predicated (R. 143–144); that from 1937 to 1942, he had purchased furniture and equipment on installment contracts; and that in 1942, he had surrendered some shares of stock in order to liquidate an indebtedness of $200 which had been extant since 1932, the stock paying a 6% dividend within 20 days after surrender (R. 488).

Supra pp. 6–7. This evidence surely permitted the inference, if it did not require it, that the petitioner had no accumulated funds at the beginning of 1943 sufficient to account for the total net worth increase of approximately $65,000, or any substantial part of it. (R. 488.) It justified the jury's disregard of the testimony of the petitioner and his witnesses touching alleged sources of prior accumulated funds. Under these circumstances, the prosecution's theory that income tax evasion could be shown from the annual increases in petitioner's net worth was sound, and the proof implementing it fully sustained the verdict. See *United States* v. *Chapman*, 168 F. 2d 997 (C. A. 7), certiorari denied, 335 U. S. 853; cf. *United States* v. *Potson* (C. A. 7), decided December 23, 1948 (Prentice–Hall 1949 Tax Service, par. 72, 284).

II

The bill of particulars stated that the item "income from business" in each count of the indictment referred to the petitioner's restaurant business known as the California Oyster House. (R. 17–18.) The petitioner claims that the proof transcended the scope of the bill, in that there was no proof that the unreported income was derived from this source (Pet. 2–3, 14–16.) The contention is without merit. As stated above, the proof of net worth increases in the taxable years, plus evidence of the nonexistence of prior ac-

cumulated assets, warranted findings that the petitioner earned net income in each of the years involved, exceeding the amounts reported. However, in addition to the proof of additional net income, the record showed clearly that the petitioner currently was engaged in an income producing retail business. (R. 491.) This concomitance of proof warranted a finding that the unreported net income was derived from the petitioner's conduct of the California Oyster House. Cf. *United States* v. *Johnson, supra; United States* v. *Chapman, supra; United States* v. *Potson, supra.*

The petitioner's complaint is groundless for the further reason that the indictment and the bill of particulars precisely informed him of the nature of the offenses charged, and of the general character of the evidence the Government expected to rely upon to sustain those charges. He was not entitled to more. *United States* v. *Skidmore,* 123 F. 2d 604 (C. A. 7), certiorari denied, 315 U. S. 800. No possible error may be urged on the basis of the alleged variance, particularly in view of the grave doubt expressed by the trial court (R. 170) that the petitioner was entitled to a bill since he had so conducted his affairs as to make it difficult, if not impossible, for the Government to particularize.

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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